

# Disparate Impact on Death Row:

## *M.L.B.* and the Indigent's Right to Counsel at Capital State Postconviction Proceedings

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Over the past forty years, the Supreme Court has struggled to find the proper level of access to the justice system for the poor. The United States's commitment to a market economy inevitably results in wealth disparities that prevent the poor from receiving the same level of access to counsel as the rich. In trying to resolve the resulting tension between capitalism and equal justice, the Court has rejected most attempts to remedy the effects of the law on disadvantaged groups.

As an alternative, the Court has recognized a limited number of fundamental constitutional rights under the Fourteenth Amendment's Equal Protection Clause. In some cases, the fundamental rights strand of equal protection has secured equal access to the justice system for the poor by waiving filing and transcript fees and by providing counsel. A recent parental termination case involving a transcript fee waiver was a rare instance in which the Court explicitly sought to remove poverty as a barrier to justice.

In December 1996, the Court held that Melissa Lumpkin Brooks, an indigent Mississippi woman, was entitled to a free transcript in order to appeal the state's decision to take away her two children. The 6-3 decision in *M.L.B. v. S.L.J.*<sup>1</sup> was based on the fundamental right of access to the criminal process initially recognized in the 1956 case of *Griffin v. Illinois*.<sup>2</sup> *Griffin*, relying on the Equal Protection and Due Process Clauses, held that an indigent criminal

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1. 117 S. Ct. 555 (1996). *M.L.B.* and *S.L.J.* are the initials of Melissa Lumpkin Brooks and her former husband, Sammy Lee James. The Mississippi Supreme Court required the use of their initials to protect the identities of their minor children. See Petition for Writ of Certiorari at ii, *M.L.B.* (No. 95-853). Brooks, however, disclosed their identities during interviews with the press. See Joan Biskupic, *Justices Give Indigent Parents Greater Access to Civil Appeals*, WASH. POST, Dec. 17, 1996, at A2; Linda Greenhouse, *Needy Who Lose Parental Rights Gain in Top Court*, N.Y. TIMES, Dec. 17, 1996, at A1; Frank J. Murray, *Mother Who Lost Her Parental Rights Seeks Ruling on Free 'Pauper' Appeal*, WASH. TIMES, Mar. 24, 1996, at A3; Frank J. Murray, *Poverty Can't Halt Appeal of Stripped Parental Rights, High Court's Ruling Removes 'Bolts'*, WASH. TIMES, Dec. 17, 1996, at A6; cf. David G. Savage, *People's Court Ruling for a Mother's Rights Puts Human Face on Supreme Court's Work*, A.B.A. J., Mar. 1997, at 40, 40 ("Sometimes a seemingly minor case can shine a light on the judicial system and reveal much about the workings of the law: how procedural rules can have a powerful real-life significance, how poverty and justice intersect, how even a Supreme Court inclined to defer to the states can be aroused to protect fundamental interests.").

2. 351 U.S. 12 (1956) (plurality opinion).

defendant had the right to a free transcript in order to pursue a direct appeal.<sup>3</sup> In providing Brooks with a free transcript, the *M.L.B.* Court found that parental termination cases, although technically civil, are “quasi criminal in nature”<sup>4</sup> and therefore fall under *Griffin*’s right of access to the criminal process. Thus, *M.L.B.* can be construed as expanding the fundamental right of access to the criminal process on behalf of the poor.

The *M.L.B.* Court’s apparent enlargement of a fundamental constitutional right provoked a vigorous dissent from the Court’s more conservative Justices.<sup>5</sup> Justice Thomas, whose dissent was so strident that Chief Justice Rehnquist refused to join part of it,<sup>6</sup> called for the overruling of the *Griffin* line of cases.<sup>7</sup> Furthermore, Justice Thomas decried the extension of *Griffin*’s right of access from criminal to quasi-criminal cases: “*Griffin* did not merely invent the free transcript right for criminal appellants; it was also the launching pad for the discovery of a host of other rights. I fear that the growth of *Griffin* in the criminal area may be mirrored in the civil area.”<sup>8</sup>

Although Justice Thomas’s “fear” about purely civil cases is important, a more pressing concern may be the extension of *M.L.B.* to the state postconviction appeals of indigent death row inmates such as Georgia’s Exzavious Lee Gibson. In September 1996, Gibson represented himself involuntarily before a Butts County judge. Gibson, who is borderline mentally retarded, was too poor to afford an attorney, and Georgia had refused to appoint him counsel for his state postconviction hearing.<sup>9</sup> Gibson’s case, which a law firm subsequently took pro bono, is being appealed.<sup>10</sup>

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3. *See id.* at 19.

4. *M.L.B.*, 117 S. Ct. at 561 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971)).

5. *See id.* at 570-78 (Thomas, J., dissenting). Justice Scalia joined all of Justice Thomas’s opinion. *See id.*

6. Chief Justice Rehnquist refused to join part II of Justice Thomas’s opinion, which suggested that *Griffin* should be overruled. *See id.* at 570 (Rehnquist, C.J., dissenting).

7. Justice Thomas wrote: “If this case squarely presented the question, I would be inclined to vote to overrule *Griffin* and its progeny.” *Id.* at 575 (Thomas, J., dissenting).

8. *Id.* at 577 (citations omitted). Justice Thomas envisaged fee waivers for indigent civil litigants embroiled in paternity suits, custody fights, divorce decrees, zoning ordinance challenges, and foreclosure actions. *See id.* at 576-77. “In brushing aside the distinction between criminal and civil cases—the distinction that has constrained *Griffin* for forty years—the Court has eliminated the last meaningful limit on the free-floating right to appellate assistance,” Justice Thomas wrote. “I have no confidence that the majority’s assurances that the line starts and ends with this case will hold true.” *Id.* at 577-78.

9. For the most complete transcript of Gibson’s state habeas hearing, see Ann Woolner, *Why Can’t the Condemned Die Without a Fuss?*, FULTON COUNTY DAILY REP., Dec. 23, 1996, at 1, available in LEXIS, News Library, Curnws File [hereinafter Woolner, *Condemned*]. *See also* *End Death-Row Roulette*, USA TODAY, Feb. 6, 1997, at 12A; Bob Herbert, *In America: The Hanging Tree*, N.Y. TIMES, Jan. 6, 1997, at A17; Bill Rankin, *When Death Row Inmates Go to Court Without Lawyers in the Late Stages of Their Fight To Stay Alive, Some Must Represent Themselves*, ATLANTA J. CONST., Dec. 29, 1996, at D5; Ann Woolner, *Four Savannah Kids’ Fortunes Rise: They Get Some Settlement from Mom’s Case*, FULTON COUNTY DAILY REP., Apr. 21, 1997, at 1, available in LEXIS, News Library, Curnws File [hereinafter Woolner, *Fortunes*].

10. An Atlanta law firm, King & Spalding, filed an appeal for a certificate of probable cause on Gibson’s behalf to the Georgia Supreme Court. The appeal is still pending. *See* Application for Certificate of Probable Cause to Appeal, *Gibson v. Turpin* (Ga. May 27, 1997) (No. 95-V-648).

In recent years, the Court has been reluctant to invoke the fundamental rights strand of equal protection law to prevent the states from discriminating against the poor.<sup>11</sup> This Note, however, argues that the Court should use *M.L.B.*, the fundamental right of access to the criminal process, and wealth-based disparate impact theory to shift the current state of equal protection law so as to provide counsel at state postconviction review for indigent death row inmates such as Gibson.

Part I argues that by relying on *Griffin*'s fundamental right of access to the criminal process, *M.L.B.* could revive wealth-based disparate impact theory. It contends that *M.L.B.* limited the discriminatory purpose or intent requirement of *Washington v. Davis*,<sup>12</sup> an equal protection case that has impeded disparate impact challenges. Based on *M.L.B.*, this part argues that the Court should recognize a fundamental rights exception to *Davis*'s discriminatory purpose requirement. It asserts that *Griffin*'s fundamental right of access to the criminal process, contrary to Justice Thomas's dissent, is still good law and was not implicitly overruled by *Davis*.

Part II uses *M.L.B.*'s emphasis on equal protection to argue that indigent death row inmates such as Gibson should receive appointed counsel at state postconviction review. If the Court is going to forbid death row prisoners from filing successive federal habeas petitions, the part argues, the inmates should have counsel their first time through the capital appellate process. Thus, *Murray v. Giarratano*,<sup>13</sup> which held that neither the Fourteenth Amendment's Due Process Clause nor the Eighth Amendment requires the states to provide death row inmates with counsel at postconviction proceedings, should be overruled.<sup>14</sup> Part II also demonstrates that state postconviction review of death penalty cases triggers *Griffin*'s fundamental right of access to the criminal process under the Equal Protection Clause. The Court, therefore, should recognize and apply a fundamental rights exception in the cases of indigent death row inmates who are in need of counsel at state postconviction proceedings.

#### I. *M.L.B.*: THE REVIVAL OF WEALTH-BASED DISPARATE IMPACT THEORY?

Disparate impact,<sup>15</sup> often referred to as "de facto discrimination,"<sup>16</sup> is an equal protection theory concerned with discriminatory effects or results.

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11. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 285 (1991) ("[A]pprehension regarding the fundamental rights strand was due not to its constitutionalizing of unenumerated rights, but rather to its potential for judicial wealth distribution.").

12. 426 U.S. 229 (1976).

13. 492 U.S. 1 (1989).

14. See *id.* at 10.

15. Disparate impact is also described in the literature as "disproportionate impact." E.g., Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977).

16. E.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 21 (1973) (emphasis omitted).

Unlike disparate treatment, or de jure discrimination, which is concerned with corrupted policies and processes imbued with discriminatory purpose or intent, disparate impact analysis focuses on facially neutral laws and practices that affect some protected groups more than other groups. For example, a facially neutral standardized test that produces a higher rate of failure among women than among men has a disparate impact on women.<sup>17</sup> Historically, disparate impact cases have focused on racial and ethnic groups. In the 1960s and 1970s, for example, desegregation litigation targeted laws with racially discriminatory effects.<sup>18</sup> Today, disparate impact challenges are commonly seen in Title VII employment discrimination cases.<sup>19</sup> Recent disparate impact challenges under equal protection law, however, have failed because *Davis's* discriminatory purpose requirement limits the Court's level of scrutiny.

Any equal protection challenge to a state law hinges largely on the Court's level of scrutiny. Strict scrutiny, which has been described as "strict" in theory but "fatal" in fact,<sup>20</sup> requires that a law be narrowly tailored to fulfill a compelling state interest. To receive strict scrutiny under equal protection, a law must either involve a suspect classification or impinge on a fundamental right.<sup>21</sup> Wealth is not a suspect classification.<sup>22</sup> Economic inequality has been redressed by the Court only where it affects rights "explicitly or implicitly guaranteed by the Constitution."<sup>23</sup> The two most frequently recognized fundamental equal protection rights are the right to vote and participate in elections<sup>24</sup> and the right of access to the

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17. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (upholding the use of a standardized test that had a disparate impact on blacks who were trying to join the Washington, D.C., police department).

18. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (declaring Tuskegee, Alabama's racial gerrymandering to be unconstitutional); *Brown v. Board of Educ.*, 347 U.S. 483, 495-96 (1954) (declaring school segregation unconstitutional). Compare *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (holding that closing the swimming pools in Jackson, Mississippi, to avoid desegregating them was not unconstitutional), with *Griffin v. County Sch. Bd.*, 377 U.S. 218, 225 (1964) (holding that closing public schools to avoid desegregation was unconstitutional).

19. See *infra* text accompanying notes 87-91.

20. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The last time the Court failed to strike down a racial classification under a strict scrutiny standard, it upheld the internment of Japanese Americans during World War II. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

21. See, e.g., *Rodriguez*, 411 U.S. at 17.

22. See, e.g., *id.* at 28-29 (finding that wealth is not a suspect classification). Suspect classifications include race, national origin, and alienage. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880) (race); *Korematsu*, 323 U.S. at 217 (national origin); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage). Quasi-suspect classifications, which require heightened, but not strict, scrutiny, include gender and illegitimacy. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy); *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) (illegitimacy).

23. *Rodriguez*, 411 U.S. at 33-34.

24. See *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (waiving filing fees for indigent candidates who demonstrate the seriousness of their candidacies); *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (striking down a Texas system of primary elections requiring exorbitant filing fees); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating a Virginia poll tax because it interfered with the right to vote); *Reynolds v. Sims*, 377 U.S. 533, 561-62, 568-71 (1964) (rejecting Alabama's reapportionment

criminal process.<sup>25</sup>

If an equal protection case does not involve suspect classes or fundamental rights, the law in question will be reviewed under a rational basis test. Laws subject to rationality review require only legitimate state interests and usually are entitled to a “strong presumption of validity.”<sup>26</sup> In general, unintended wealth-based effects will be ignored; the best chance such effects have of being redressed is if fundamental rights, like the right to vote or the right of access to the criminal process, are at stake.

#### A. *Griffin v. Illinois: The Rise of Wealth-Based Disparate Impact Theory*

Beginning in the mid-1950s, the Warren Court began proscribing discrimination based on wealth by announcing fundamental equal protection rights. In *Griffin v. Illinois*,<sup>27</sup> an Illinois law requiring transcripts prevented two convicted armed robbers from appealing their cases to the state supreme court. A plurality of the *Griffin* Court, citing the Equal Protection and Due Process Clauses, held that an indigent criminal defendant’s direct appeal cannot be denied because of an inability to afford a transcript.<sup>28</sup> The Court said that although states are not required to provide appellate review, they cannot “discriminate[] against some convicted defendants on account of their poverty.”<sup>29</sup> Justice Black, writing on behalf of four members of the Court, declared, “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>30</sup>

By justifying his opinion under both the Equal Protection and Due Process Clauses, Justice Black ignited a forty-year controversy over the source of the right of access to the criminal process. Justice Harlan, dissenting in *Griffin*,

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scheme as racially discriminatory because voting is a fundamental right).

25. See *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (plurality opinion) (providing indigent defendants with free transcripts or their equivalent for first appeals as of right); *infra* Section I.D. In addition to these equal protection rights, the Court has recognized a right to travel, see *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), a right to procreate, see *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538 (1942), and a right to exercise First Amendment freedoms, see *Police Dep’t v. Mosley*, 408 U.S. 92, 101 (1972). In contrast, the Court has rejected fundamental equal protection rights to assisted suicide, see *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997), to government employment, see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976), to education, *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *Rodriguez*, 411 U.S. at 35, to housing, see *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972), and to welfare payments, see *Dandridge v. Williams*, 397 U.S. 471, 483-87 (1970).

26. *Quill*, 117 S. Ct. at 2297 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). On occasion, the Court has employed a more rigorous form of rational basis review. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1627-28 (1996) (striking down an amendment to the Colorado Constitution that forbade any laws protecting homosexuals from discrimination).

27. 351 U.S. 12 (1956) (plurality opinion).

28. See *id.* at 18-19.

29. *Id.* at 18.

30. *Id.* at 19.

preferred to rely on the Due Process Clause.<sup>31</sup> Footnote eleven of Justice Black's plurality opinion answered Justice Harlan's dissent by explicitly discussing the disparate impact theory of equal protection: "Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. *But a law nondiscriminatory on its face may be grossly discriminatory in its operation.*"<sup>32</sup> *Griffin* was the first instance in which the Court redressed the effects of economic inequality through the Equal Protection Clause. "In criminal trials," Justice Black wrote, "a State can no more discriminate on account of poverty than on account of religion, race, or color."<sup>33</sup>

Justice Frankfurter provided the fifth vote in *Griffin*. A firm believer in the principles of judicial restraint and federalism,<sup>34</sup> Justice Frankfurter wrote that "a State need not equalize economic conditions."<sup>35</sup> He recognized, however, that the Court must strike a balance: "[T]he State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."<sup>36</sup>

At first, the Court erred on the side of not bolting the door. Seven years after *Griffin*, in *Douglas v. California*,<sup>37</sup> the Court reaffirmed *Griffin*'s reasoning under an equal protection theory. *Douglas* held that an indigent criminal not only had the right to a free transcript at direct appeal, but also the right to counsel because of the "equality demanded by the Fourteenth Amendment."<sup>38</sup> To the Court's lone dissenter, Justice Clark, *Douglas* represented a "fetish for indigency."<sup>39</sup> The majority, viewing the law as a case of "'discrimination against the indigent,'"<sup>40</sup> said counsel represented the difference between a "meaningless ritual" and a "meaningful appeal."<sup>41</sup>

The Warren Court's concern for the indigent reached new levels when it tried to make wealth a suspect classification in *Harper v. Virginia Board of Elections*.<sup>42</sup> *Harper* struck down a poll tax of \$1.50 on all Virginia residents over twenty-one as discriminating against the indigent's right to vote, holding that the tax violated the Equal Protection Clause because voting is a

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31. Justice Harlan rejected the idea that the "Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances." *Id.* at 34 (Harlan, J., dissenting).

32. *Id.* at 17 n.11 (plurality opinion) (citing *Guinn v. United States*, 238 U.S. 347 (1915)) (emphasis added).

33. *Id.* at 17.

34. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 647-48 (1943) (Frankfurter, J., dissenting) (advocating judicial restraint in a flag salute case).

35. *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring in the judgment).

36. *Id.* at 24.

37. 372 U.S. 353 (1963). *Douglas* was decided the same day as *Gideon v. Wainwright*, 372 U.S. 335 (1963), which provided a right to counsel for the indigent at all felony trials.

38. *Douglas*, 372 U.S. at 358.

39. *Id.* at 359 (Clark, J., dissenting).

40. *Id.* at 355 (majority opinion) (quoting *Griffin*, 351 U.S. at 19 (plurality opinion)).

41. *Id.* at 358.

42. 383 U.S. 663 (1966).

fundamental right “‘preservative of all rights.’”<sup>43</sup> The poll tax in *Harper* primarily constituted an effort to deter blacks from voting, yet the Court’s opinion focused on wealth: “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”<sup>44</sup> *Harper* was one of the Warren Court’s boldest attempts, in dicta, to make wealth a suspect classification.<sup>45</sup> Although the attempt ultimately failed,<sup>46</sup> *Harper* established the right to vote, like *Griffin*’s right of access to the criminal process, as a fundamental equal protection guarantee.

### B. *The Fall of Wealth-Based Equal Protection*

During the 1970s, the Burger Court halted the expansion of fundamental equal protection rights and thwarted any attempts to declare wealth a suspect classification. *San Antonio Independent School District v. Rodriguez*<sup>47</sup> held that Texas’s system of funding public education did not violate the Equal Protection Clause, in part because it did not result in “an absolute deprivation of the desired benefit.”<sup>48</sup> *Rodriguez* said that wealth is not a suspect classification<sup>49</sup> and that education is not a fundamental right on a par with the right to vote or the right of access to the criminal process.<sup>50</sup> The Court thus crippled attempts to proscribe discrimination solely on the basis of wealth.

After *Rodriguez*, the only hope of redressing the effects of economic inequality was through existing fundamental equal protection rights. *Washington v. Davis*,<sup>51</sup> however, curtailed the use of wealth-based disparate impact theory. Several black applicants to the Washington, D.C., police force challenged the validity of a standardized test, which they claimed excluded a disproportionate number of black candidates.<sup>52</sup> The Court rejected the challenge, holding that an equal protection claim required a showing of

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43. *Id.* at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

44. *Id.* at 668 (citation omitted).

45. See also *McDonald v. Board of Election Comm’rs*, 394 U.S. 802, 807 (1969) (“[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.” (citation omitted)). Frank Michelman, in his seminal discussion of wealth-based equal protection, argued that in a market economy, wealth cannot be a suspect classification. Instead, he espoused a “minimum protection” theory, based on a Rawlsian theory of social justice, which satisfies basic economic deprivations, or “just wants.” Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).

46. See *infra* text accompanying notes 47-50.

47. 411 U.S. 1 (1973).

48. *Id.* at 23; cf. *Plyler v. Doe*, 457 U.S. 202, 238 (1982) (applying heightened scrutiny to a state education policy in part because it absolutely deprived children of illegal immigrants of an education).

49. See *Rodriguez*, 411 U.S. at 28-29.

50. See *id.* at 35; see also *id.* at 33 (“It is the not province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”).

51. 426 U.S. 229 (1976).

52. Four times as many blacks failed the test as did whites. See *id.* at 237.

discriminatory purpose.<sup>53</sup> *Davis's* discriminatory purpose requirement impeded the use of the disparate impact theory of equal protection to remedy the effects of economic inequality.

While the facts of *Davis* were limited to race-based disparate impact, the Court also addressed disparate impact based on wealth. Just three years after *Rodriguez*, *Davis* reaffirmed the Court's disapproval of using the Equal Protection Clause to alleviate wealth disparities. The *Davis* Court, in dicta, placed a dual emphasis on race and class.<sup>54</sup> *Davis's* discriminatory purpose requirement became the biggest roadblock for wealth-based disparate impact theory. For the next twenty years, the only debate was the extent of *Davis's* reach. There were no successful challenges to *Davis*—at least not until *M.L.B.*

### C. *The Meaning of M.L.B.*

*M.L.B.* addressed the differing interpretations of *Washington v. Davis*, the scope of the *Griffin* line of cases, the choice between equal protection and due process, and the future of disparate impact analysis as a means of combating discrimination against the poor. It also gave an indigent Mississippi woman hope that she would regain the right to be a mother to her two children.

#### 1. *The Facts*

In 1992, Meredith Lumpkin Brooks and Sammy Lee James were divorced after nearly eight years of marriage. James retained custody of their two children, Samuel and Melissa, who were seven and five at the time.<sup>55</sup> Less than three months later, James remarried. About a year later, he petitioned to terminate Brooks's parental rights so his new wife could adopt the children. In December 1994, a Benton County, Mississippi, chancery court found "clear and convincing proof" of "substantial erosion" of Brooks's relationship to her children,<sup>56</sup> but "cited no specific evidence to support the

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53. As Justice White wrote for the 6-3 majority:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

*Id.* at 242.

54. The *Davis* Court said:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be *more burdensome to the poor* and to the average black than to the more affluent white.

*Id.* at 248 (emphasis added).

55. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 559 (1996).

56. Decree of Adoption ¶¶ 1, 3, *S.L.J. v. M.L.B.*, No. 93-A-006 (Miss. Ch. Ct. Dec. 14, 1996), reprinted in Petition for Writ of Certiorari app. at 10, *M.L.B.* (No. 95-853).



decision.”<sup>57</sup> Brooks’s name was removed from their birth certificates, and she “was decreed, forevermore, a stranger to her children.”<sup>58</sup>

Brooks, a twenty-eight-year-old waitress who was making \$2.13 an hour plus tips,<sup>59</sup> filed a timely appeal to the state supreme court and paid the requisite \$100 filing fee. Several days later, a court clerk estimated that the costs of the transcript fees in her case would be \$2,352.36.<sup>60</sup> Under Mississippi law, there is a right to an appeal, but only upon payment of costs.<sup>61</sup> Unable to afford such fees, Brooks filed a motion for *in forma pauperis* status. In August 1995, the Mississippi Supreme Court denied her request and held that it accepted *in forma pauperis* motions in civil cases only at the trial level. The U.S. Supreme Court granted certiorari,<sup>62</sup> heard the case on October 7, 1996, and on December 16 reversed and remanded the state supreme court’s decision. The Court held that in parental termination cases indigent defendants cannot be denied appellate review because of an inability to afford transcripts.<sup>63</sup> What remains undetermined, besides Brooks’s right to her children,<sup>64</sup> is the impact of the Court’s justification for its decision under the Fourteenth Amendment’s Equal Protection Clause.

## 2. The Holding: Equal Protection and Due Process

*M.L.B.* “reflect[s] both equal protection and due process concerns”<sup>65</sup> because *Griffin*’s fundamental right of access to the criminal process is inextricably linked to both clauses of the Fourteenth Amendment.<sup>66</sup> According to *M.L.B.*, due process is concerned with “the essential fairness of the state-ordered proceedings anterior to adverse state action”; equal protection is based on “the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs.”<sup>67</sup>

*M.L.B.* relied more heavily on equal protection because “[m]ost decisions in this area,’ we have recognized, ‘res[t] on an equal protection

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57. Petition for Writ of Certiorari at 3.

58. *M.L.B.*, 117 S. Ct. at 560.

59. See *Savage*, *supra* note 1, at 40.

60. See Petition for Writ of Certiorari at 4.

61. See MISS. CODE ANN. § 11-51-29 (1972 & Supp. 1997).

62. The ACLU of Mississippi paid the filing fees for Brooks’s petition for certiorari to the Supreme Court. See Petition for Writ of Certiorari at 8 n.2.

63. See *M.L.B.*, 117 S. Ct. at 559 (citing *Mayer v. City of Chicago*, 404 U.S. 189, 195-96 (1971)).

64. The Mississippi Supreme Court granted Brooks *in forma pauperis* status and is still considering the merits of her appeal. Telephone Interview with Danny Lampley, Cooperating Attorney, ACLU of Mississippi (Jan. 26, 1998). Brooks is now a waitress in Memphis. See Biskupic, *supra* note 1.

65. *M.L.B.*, 117 S. Ct. at 566.

66. See *id.* (“[I]n the Court’s *Griffin*-line cases, ‘[d]ue process and equal protection principles converge.’” (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983))).

67. *Id.*

framework.”<sup>68</sup> *M.L.B.*’s holding is based primarily on *Mayer v. City of Chicago*,<sup>69</sup> an equal protection case. In *Mayer*, a student could not afford the transcript fees to challenge two petty criminal offenses. *Mayer* held that *Griffin*’s fundamental right of access to the criminal process—specifically the provision of free transcripts or their equivalent—does not depend on the threat of incarceration.<sup>70</sup> *M.L.B.* analogized Brooks’s parental termination case to the petty criminal offenses in *Mayer*. The Court agreed with the petitioner’s claim that a mother’s losing her children is “barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss she faces.”<sup>71</sup> By labeling *M.L.B.* “quasi criminal in nature,” the Court was able to fit it under *Griffin*’s right of access to the criminal process.<sup>72</sup>

Justice Kennedy wrote a two-paragraph concurrence suggesting that the cases “most on point” should be seen as “resting exclusively upon the Due Process Clause.”<sup>73</sup> He analogized *M.L.B.* to cases “addressing procedures involving the rights and privileges inherent in family and personal relations”<sup>74</sup> and suggested the decision should be based on *Mathews v. Eldridge*’s due process balancing test.<sup>75</sup> The *M.L.B.* Court cited several due process cases, including *Boddie v. Connecticut*,<sup>76</sup> which held that states could not deny indigents divorces because of the inability to pay court fees.<sup>77</sup> It also relied on two previous parental termination cases based on due process.<sup>78</sup>

68. *Id.* (quoting *Bearden*, 461 U.S. at 665). The *Bearden* Court held that the state could not automatically revoke a defendant’s probation for failing to pay a fine and make restitution. *See Bearden*, 461 U.S. at 661-62. Justice O’Connor’s majority opinion, however, ultimately agreed with Justice Harlan’s argument in *Griffin* and focused on due process. *See id.* at 666 & n.8.

69. 404 U.S. 189 (1971).

70. *See id.* at 197 (“The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.”).

71. *M.L.B.*, 117 S. Ct. at 565. In *M.L.B.*, the Court considered (1) “the character and intensity of the individual interest at stake”; and (2) “the State’s justification for its exaction.” *Id.* at 566 (citing *Bearden*, 461 U.S. at 666-67).

72. *Id.* at 568 (quoting *Mayer*, 404 U.S. at 196).

73. *Id.* at 570 (Kennedy, J., concurring). One *M.L.B.* commentator suggested that *Boddie v. Connecticut*, 401 U.S. 371 (1971), involved an “access-plus” standard, in which the fundamental right of access, plus an additional fundamental right such as marriage, triggers heightened scrutiny. *See The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 251-52 (1997). The commentator, however, did not rule out an interpretation based strictly on equal protection, but criticized a dual equal protection-due process rationale. *See id.* at 256-57.

74. *M.L.B.*, 117 S. Ct. at 570 (Kennedy, J., concurring).

75. *See id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)); *see also The Supreme Court, 1996 Term—Leading Cases*, *supra* note 73, at 256 n.63 (suggesting the *M.L.B.* Court actually conducted an *Eldridge* balancing of the private interests, public interests, and risk of error); *cf. Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (criticizing the *Eldridge* test for ignoring alternative value theories such as individual dignity, equality, and tradition or evolution).

76. 401 U.S. 371 (1971), *cited in M.L.B.*, 117 S. Ct. at 562.

77. *See id.* at 380-81.

78. The *M.L.B.* Court relied on *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), which held that “clear and convincing” proof is required in parental termination cases; and *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27 (1981), which held that the appointment of counsel in parental termination cases is at the discretion of the trial court. *See M.L.B.*, 117 S. Ct. at 557, 564.

Although Justice Kennedy's concurrence relied more heavily on due process, it cannot be the primary source of the Court's opinion for several reasons. First, due process concerns for the indigent are limited in civil cases. The Court has refused to extend *Boddie* to include bankruptcy actions<sup>79</sup> or judicial review of welfare benefits,<sup>80</sup> and it has limited the state's obligation to provide counsel in parental termination cases.<sup>81</sup> The *M.L.B.* Court recognized that, under due process, "fee requirements ordinarily are examined only for rationality. The State's need for revenue to offset costs, in the main run of cases, satisfies the rationality requirement."<sup>82</sup>

Second, due process does not require the state to provide appellate review.<sup>83</sup> Although the *M.L.B.* majority disagreed with Justice Thomas's complete rejection of due process,<sup>84</sup> it shared his belief that the *Griffin-Douglas* line of cases is "best understood as grounded in equal protection analysis."<sup>85</sup> The key to *M.L.B.* was not only the fairness of the state's judicial process, but also the denial of Brooks's fundamental right of access to the criminal process because of her indigency. While due process is invariably a component of *Griffin*'s right of access, equal protection is at least as important, if not more so. Justice Thomas, however, ultimately rejected the *M.L.B.* Court's equal protection theory because of his desire to overrule *Griffin* and his overexpansive understanding of *Washington v. Davis*.

### 3. *The Fundamental Rights Exception to Washington v. Davis*

The future of disparate impact theory is essentially a fight over the scope of the discriminatory purpose requirement of *Davis*. Discriminatory purpose has been defined as "impl[y]ing] that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>86</sup> A case about racial discrimination in public employment, *Davis* provided an alternative to the statutory disparate impact theory of employment discrimination presented

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79. See *United States v. Kras*, 409 U.S. 434, 446 (1973).

80. See *Ortwein v. Schwab*, 410 U.S. 656, 661 (1973).

81. See *Lassiter*, 452 U.S. at 26-27.

82. *M.L.B.*, 117 S. Ct. at 567 (citation omitted).

83. See *id.* at 560; *id.* at 571 (Thomas, J., dissenting); see also *Johnson v. Fankell*, 117 S. Ct. 1800, 1807 n.13 (1997) ("We have made it quite clear that it is a matter for each State to decide how to structure its judicial system." (citing *M.L.B.*, 117 S. Ct. at 561)); *McKane v. Durston*, 153 U.S. 684, 687 (1894) (holding that appellate review of a criminal case is not required by due process, but is up to the discretion of the states).

84. Justice Thomas rejected a due process argument because the petitioner received notice and a hearing before a judge, her attorney confronted the evidence and witnesses against her at trial, and the judge decided the case under a clear-and-convincing-evidence standard. See *M.L.B.*, 117 S. Ct. at 572 (Thomas, J., dissenting).

85. *Id.* at 571; *accord id.* at 566 (majority opinion).

86. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

in *Griggs v. Duke Power Co.*<sup>87</sup> In *Griggs*, the Court struck down the company's requirement of a high school diploma as not job-related and as discriminating against black employees seeking to move from the company's labor department into higher-paying jobs in other departments. The *Griggs* Court held that Title VII of the 1964 Civil Rights Act did not require a showing of discriminatory purpose. It embraced disparate impact theory by prohibiting "practices that are fair in form, but discriminatory in operation."<sup>88</sup> Chief Justice Burger's majority opinion declared that "practices, procedures, or tests neutral on their face, and *even neutral in terms of intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>89</sup> The holding in *Griggs* was limited to Title VII employment discrimination "on the basis of racial or other impermissible classification."<sup>90</sup>

The *Davis* Court distinguished its holding from *Griggs* by asserting that Title VII did not apply to the *Davis* petitioners. Furthermore, *Davis* separated Title VII from the Fourteenth Amendment's Equal Protection Clause, requiring a showing of discriminatory purpose in cases based on the latter. *Davis* did not overrule *Griggs*, although the Court has subsequently tried to do so.<sup>91</sup> Neither *Griggs* nor *Davis* discussed anything other than racial discrimination in employment.

The discriminatory purpose requirement, although hotly debated by scholars,<sup>92</sup> has been applied in a number of contexts. Disparate impact

87. 401 U.S. 424 (1971).

88. *Id.* at 431.

89. *Id.* at 430 (emphasis added).

90. *Id.* at 431.

91. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (rejecting disparate impact analysis in a Title VII case). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (1994)), was passed in part as a response to *Wards Cove*.

92. Scholars have come down on both sides of the debate. My work relies heavily on the ideas of Professor Owen Fiss, who has advocated the use of disparate impact theory through group-based equal protection rights. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 146 (1976) ("The concern with the result reveals to me that what is ultimately at issue is the welfare of certain disadvantaged groups . . .") [hereinafter Fiss, *Groups*]; Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 593 & n.50 (1965) (suggesting that *Griffin* holds that disparate racial impact violates the Equal Protection Clause). For criticisms of the discriminatory purpose (or intent) requirement, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-20 (2d ed. 1988); Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397; Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); and David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989). For defenses of the discriminatory intent requirement, see Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; and John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). For proposals of equal protection doctrines that partially incorporate an intent requirement, see Eisenberg, *supra* note 15, which develops an equal protection theory

challenges have failed in attacks on alleged gender-based discrimination in public employment,<sup>93</sup> alleged racial discrimination in zoning,<sup>94</sup> and alleged racial discrimination in the administration of the death penalty.<sup>95</sup> *Davis* became the rule in equal protection cases: Disparate impact, without disparate treatment, does not trigger a constitutional violation.

When the discriminatory purpose requirement was applied in a Fifteenth Amendment case, however, Justice Marshall argued that *Davis* had been extended too far. In *City of Mobile v. Bolden*,<sup>96</sup> a plurality of the Court held that Mobile's electoral system did not violate the rights of the city's black voters and required a showing of racially discriminatory purpose to prove a violation of the Fifteenth as well as the Fourteenth Amendment.<sup>97</sup> In dissent, Justice Marshall objected to the plurality's holding that "[o]nly if there is purposeful discrimination . . . can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."<sup>98</sup> Justice Marshall said such an interpretation of *Davis* was "plainly overbroad" and that "[i]t fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights."<sup>99</sup>

Justice Marshall argued that discriminatory purpose is not required to trigger strict scrutiny if fundamental equal protection rights are at stake. Justice Marshall said the discriminatory purpose requirement did not apply to the "fundamental right to equal electoral participation that encompasses vote dilution."<sup>100</sup> Therefore, Justice Marshall asserted, *Bolden* was controlled not by *Davis* but by a vote-dilution case, *White v. Register*,<sup>101</sup> which was decided three years before *Davis* and did not require a showing of discriminatory purpose.<sup>102</sup> Justice Marshall thus attempted to create a fundamental rights

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based on both disparate impact and disparate treatment; and Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976), which advocates an antidiscrimination principle prohibiting both intentional discrimination and unintentional race-dependent decisionmaking.

93. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

94. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

95. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). For criticism of *McCleskey*, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

96. 446 U.S. 55 (1980) (plurality opinion).

97. See *id.* at 61.

98. *Id.* at 112-13 (Marshall, J., dissenting) (quoting *id.* at 66 (plurality opinion)). Justice Stevens, concurring in *Bolden*, explicitly rejected the idea that the discriminatory purpose requirement should be extended to Fifteenth Amendment cases. See *id.* at 83, 85 (Stevens, J., concurring).

99. *Id.* at 113 (Marshall, J., dissenting).

100. *Id.* at 114.

101. 412 U.S. 755 (1973).

102. See *Bolden*, 446 U.S. at 119-20 (Marshall, J., dissenting). Subsequent cases appear to suggest the existence of a fundamental rights exception, at least for voting, where discriminatory intent could be inferred from strong showings of disparate impact. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down an Alabama constitutional provision's disenfranchisement of people for crimes of moral turpitude such as vagrancy and passing bad checks by relying on historical proof of the law's targeting of black voters); *Rogers v. Lodge*, 458 U.S. 613 (1982) (upholding the finding of purposeful discrimination in an at-large voting district in a rural Georgia county based on facts similar to those in *Bolden*). This exception,

exception to the discriminatory purpose requirement.

Although the *Bolden* plurality chose not to embrace Justice Marshall's fundamental rights exception, the Court<sup>103</sup> and commentators<sup>104</sup> have recognized variations on Justice Marshall's theme. For example, Professor Daniel Ortiz has argued that *Davis*'s discriminatory purpose requirement is stronger in housing and employment cases than in cases of jury selection, voting, and education. "Intent takes into account not only the invidiousness of the government's classification but also the importance of the individual interests at stake," Ortiz writes, describing the fundamental rights exception as a "hierarchy" of rights.<sup>105</sup> Justice Marshall fleshed out this hierarchy in a footnote to his *Bolden* dissent, listing the Court's decisions that recognized other fundamental rights unaffected by *Davis*.<sup>106</sup> Among them were *Griffin* and *Douglas*'s "right to fair access to criminal process."<sup>107</sup>

Sidestepping *Davis* was the key to the Court's decision in *M.L.B.* The respondents in *M.L.B.* contended that *Davis*'s discriminatory purpose requirement applied to this case: "This must be all the more true with respect to an allegedly disparate impact on a class that, unlike race, is not suspect. This Court has specifically held that the poor are not a suspect class."<sup>108</sup> Under Justice Marshall's conception of *Davis*, however, it was irrelevant that wealth is not a suspect classification. As a case about the fundamental right of access, *M.L.B.* did not require a showing of discriminatory purpose. In effect, Justice Ginsburg's majority opinion can be read as accepting Justice Marshall's view and rejecting the respondents' arguments. Justice Ginsburg wrote for the majority that *Davis* "does not have the sweeping effect respondents attribute to it."<sup>109</sup> To prove this, Justice Ginsburg cited a disparate impact case upholding the right of access to the criminal process that Justice Marshall had asserted was beyond the pale of *Davis*.<sup>110</sup>

The *M.L.B.* Court held that the case was not controlled by *Davis*, but by *Williams v. Illinois*.<sup>111</sup> In *Williams*, the state forced an indigent prisoner

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however, has not been extended to other fundamental rights. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting a statistical study as proof of purposeful racial discrimination in the administration of the death penalty). *Rogers* and Justice Marshall's dissent in *Bolden* raise the question whether the requirement of purposeful discrimination should be less strict for group rights than for individual rights. See GERALD GUNTHER, CONSTITUTIONAL LAW 710 n.1 (12th ed. 1991). For a discussion of group-based equal protection rights, see Fiss, *Groups*, *supra* note 92.

103. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 233 (1982) ("Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States. . . .").

104. See, e.g., Klarman, *supra* note 11, at 289 n.349; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1140 (1989) (suggesting that the discriminatory purpose requirement is stronger in areas "relegated primarily to market control, like housing and employment").

105. Ortiz, *supra* note 104, at 1137.

106. See *Bolden*, 446 U.S. at 113 n.9 (Marshall, J., dissenting).

107. *Id.*

108. Brief for Respondents at 31, *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996) (No. 95-853).

109. *M.L.B.*, 117 S. Ct. at 569.

110. See *id.* (citing *Williams v. Illinois*, 399 U.S. 235, 242 (1970)).

111. 399 U.S. 235 (1970).

serving a one-year sentence for petty theft to remain in jail beyond the maximum term in order to work off \$505 in fines and court costs at a rate of \$5 per day.<sup>112</sup> The *Williams* Court, on equal protection grounds, struck down the Illinois statute and held that prisoners could not be incarcerated beyond their maximum terms because of their indigency. A difficulty in using *Williams* to support *M.L.B.* is that *Williams* was decided six years before *Davis*. Despite this seeming anomaly, *Williams* is not bad law. Indeed, Justice Thomas, who alertly observed that *Williams* preceded *Davis*,<sup>113</sup> did not insist that *Williams* had been overruled.<sup>114</sup> Furthermore, Justice Scalia, who joined Justice Thomas's *M.L.B.* dissent, used *Williams* in a punitive damages case to exemplify constitutional equal protection jurisprudence.<sup>115</sup>

Justice Ginsburg's majority opinion in *M.L.B.* could rely on *Williams* in part because of the latter case's ambiguity. Chief Justice Burger, who wrote the majority opinion in *Williams*, also authored the *Griggs* Court's oft-quoted definition of disparate impact theory as "fair in form, but discriminatory in operation."<sup>116</sup> Yet, as the author of *Williams* three months later, Chief Justice Burger conflated disparate impact and disparate treatment. In the first paragraph of the *Williams* opinion, Chief Justice Burger described the claim as one of "discriminatory treatment."<sup>117</sup> He referred to disparate treatment again at the beginning of his discussion of *Griffin* and its progeny.<sup>118</sup> Then, two paragraphs later, he eschewed disparate treatment in favor of disparate impact.<sup>119</sup> He oddly introduced *Williams* as a case about disparate treatment, yet justified the Court's holding with a discussion of disparate impact.

Justice Ginsburg's *M.L.B.* opinion seized on the confusing language of *Williams*. In a cryptic paragraph, she carved out an exception to *Davis* by seemingly collapsing the categories of disparate treatment and disparate impact:

Sanctions of the *Williams* genre, like the Mississippi prescription here at issue, are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus "visi[t] different

112. See *id.* at 236.

113. See *M.L.B.*, 117 S. Ct. at 574 (Thomas, J., dissenting).

114. See *id.* ("[T]o the extent its reasoning survives *Davis*, I think that *Williams* is distinguishable.").

115. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring). Justice Scalia refused to "call [*Williams*'s constitutionality] into question." *Id.*

116. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

117. *Williams*, 399 U.S. at 236.

118. See *id.* at 241.

119. The Court wrote:

On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice . . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

*Id.* at 242.

consequences on two categories of persons"; they apply to all indigents and do not reach anyone outside that class.<sup>120</sup>

The phrase "not merely disproportionate in impact" does not allow disparate treatment to obviate the theory of disparate impact. Justice Ginsburg, like the petitioner's brief,<sup>121</sup> equated the two theories. Sometimes, in particularly invidious cases, disparate impact looks like disparate treatment.<sup>122</sup> In *M.L.B.*, the Mississippi transcript fee requirement absolutely deprived indigent mothers of any opportunity to appeal parental termination decisions. The *M.L.B.* Court was concerned with laws that "apply to all indigents and do not reach anyone outside that class."<sup>123</sup> Granted, all financial requirements impose some sort of hardship on the poor. *M.L.B.*, however, stands for the proposition that absolute deprivation cannot be tolerated when fundamental rights are at stake.

Although the *M.L.B.* opinion is ambiguous, the Court should use it to recognize a fundamental rights exception to *Davis*'s discriminatory purpose requirement. According to Justice Marshall's *Bolden* dissent, *Williams* survived *Davis* because it was based on *Griffin*'s fundamental right of access to the criminal process. Hence, *Williams* and *M.L.B.* are united by their attention to this fundamental right. Although decided six years before *Davis*, *Williams*'s protection of the fundamental right of access to the criminal process allowed *M.L.B.* to make an end-run around *Davis*.

The Court should recognize a fundamental rights exception because of the government's monopoly power over the right of access to the criminal process.<sup>124</sup> *Boddie v. Connecticut*<sup>125</sup> represented the limit of the Court's concern about how wealth disparities affect "[t]he legitimacy of the State's

120. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 569 (1996) (alteration in original) (citations omitted) (quoting *Williams*, 399 U.S. at 242).

121. The petitioner said in her brief:

Mississippi could not, consistent with the principles of the Fourteenth Amendment, limit the right of appeal to, for instance, parents who possess assets worth over \$200,000, or whose annual income exceeds over \$50,000 a year, and leave everyone else to the reason, the mercy, or the whim of a single trial judge. By excluding the petitioner from her appeal, and refusing even to consider her contention that she cannot afford the \$2,000 plus price that the State court system is charging for the appeal, the Mississippi Supreme Court is doing much the same thing.

Brief for Petitioner at 12-13, *M.L.B.* (No. 95-853).

122. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a San Francisco ordinance refusing to give licenses to laundries in wooden buildings. The stone building requirement affected more than 200 Chinese laundries and only one non-Chinese laundry. *Yick Wo* was a disparate impact case that smacked of disparate treatment. See also *supra* note 102 (discussing voting cases in which the Court found disparate impact rose to the level of disparate treatment).

123. *M.L.B.*, 117 S. Ct. at 569.

124. See Klarman, *supra* note 11, at 267, 287 (advocating a distinction between "state coercion and monopolization" and affirmative governmental assistance); *infra* note 230 and accompanying text. But see Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 58-59 (criticizing the fundamental rights strand of equal protection).

125. 401 U.S. 371 (1971).



monopoly over techniques of final dispute settlement."<sup>126</sup> Although *Boddie* is a due process case that has since been limited to divorce actions,<sup>127</sup> *M.L.B.* said access to the political and judicial processes are "exceptions"<sup>128</sup> to the rule that "States are not forced by the Constitution to adjust all tolls to account for 'disparity in material circumstances.'"<sup>129</sup> The *M.L.B.* Court distinguished an "'affirmative right to governmental aid'"<sup>130</sup> from "a State's destruction of . . . family bonds."<sup>131</sup>

The right of access to the criminal process and the right to vote may not be the most treasured rights in the minds of most Americans,<sup>132</sup> and they are not explicitly mentioned in the Constitution.<sup>133</sup> These two fundamental equal protection rights, however, are essential to American ideas about democratic self-government.<sup>134</sup> They protect what the famous *Carolene Products* footnote described as the political processes relied on by "discrete and insular minorities."<sup>135</sup> The Court has recognized that, for a prisoner, "the right to file a court action might be said to be his remaining most 'fundamental political right . . . preservative of all rights.'"<sup>136</sup> The government's monopoly power over the right to vote and *Griffin's* right of access to the criminal process

126. *Id.* at 375-76; *see id.* at 376 ("For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy."); *see also* Klarman, *supra* note 11, at 267 ("Thus while the state compels defendants' participation in the criminal justice system and monopolizes meaningful exercise of the franchise, it exerts no equivalent control over food, housing or medical care.").

127. *See supra* notes 76-81 and accompanying text.

128. *M.L.B.*, 117 S. Ct. at 568.

129. *Id.* at 567 (quoting *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)). The *M.L.B.* Court recognized two "exceptions" to rationality review: "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license. Nor may access to judicial processes in cases criminal or 'quasi criminal in nature' turn on ability to pay'" *Id.* at 568 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (citations omitted)).

130. *Id.* at 568 (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)); *see also* Klarman, *supra* note 11, at 289-90 ("The unpalatable aspect of fundamental rights equal protection, in other words, was not its recognition of unenumerated rights, but its reconceptualization of equal protection as an entitlement to affirmative governmental assistance."); *The Supreme Court, 1996 Term—Leading Cases*, *supra* note 73, at 254-55 & n.57.

131. *M.L.B.*, 117 S. Ct. at 568; *see id.* ("Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action.").

132. *See* Klarman, *supra* note 11, at 267 ("Only a lawyer, after all, could argue with a straight face that legal assistance in a criminal appeal is more important than, for example, food and shelter.").

133. The right to vote is not guaranteed anywhere in the Constitution. Only the right not to be discriminated against in voting is guaranteed. *See* U.S. CONST. amend. XIII; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 n.78 (1973) (stating that "the right to vote, *per se*, is not a constitutionally protected right").

134. One *M.L.B.* commentator noted:

[E]qual Protection alone provides principled support for requiring a waiver of appellate costs for indigents; if getting to court is truly "fundamental" to a democratic system—more like voting rights than the amorphous set of "fundamental" interests cognizable under substantive due process—then this interest alone should support a right of equal access.

*The Supreme Court, 1996—Leading Cases*, *supra* note 73, at 257 (citing *TRIBE*, *supra* note 92, § 16-12, at 1463) (footnote omitted).

135. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

136. *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

obviate the need for *Davis*'s discriminatory purpose requirement because these rights represent the political voices of the people.

#### D. Griffin's Fundamental Right of Access to the Criminal Process

Justice Thomas's dissent ignored the government's monopoly power over these fundamental rights by calling for the overruling of *Griffin* and its progeny. Justice Thomas has claimed *Griffin* and *Douglas* were overruled by *Davis*: "The *Davis* Court was motivated in no small part by the potentially radical implications of the *Griffin/Douglas* rationale."<sup>137</sup> Although there is no denying that *Rodriguez* and *Davis* dealt a dual blow to wealth-based equal protection, the *Davis* Court said nothing of *Griffin* and *Douglas*. The *Davis* Court's references to wealth could be interpreted as dicta, for there is only one oft-quoted reference to discrimination against "the poor" and the fear of widespread economic-based implications.<sup>138</sup> Justice Thomas, however, used *Davis*'s discriminatory purpose requirement as a catch-all.

The Court has legitimated *Griffin*'s fundamental right of access to the criminal process both before and since *Davis*. Although there was no fundamental rights strand of equal protection when *Griffin* was decided in 1956, cases extending the *Griffin* line during the 1960s acknowledged that the right of access to the criminal process is fundamental.<sup>139</sup> Even *Ross v. Moffitt*,<sup>140</sup> which limited the *Griffin* line of cases by holding that states were not required to provide counsel at discretionary appeals, acknowledged the valid principle in *Griffin* that "a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."<sup>141</sup> Although *Ross* limited *Griffin* two years before *Davis*, several post-*Davis* cases have recognized *Griffin*'s fundamental right of access,<sup>142</sup> and one case, *Bounds v. Smith*,<sup>143</sup> has even expanded it.

The *Bounds* Court extended *Griffin*'s right of access to the criminal process by emphasizing a right to "[m]eaningful access."<sup>144</sup> The Court held

137. *Lewis v. Casey*, 116 S. Ct. 2174, 2192 (1996) (Thomas, J., concurring).

138. See *supra* note 54.

139. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (emphasis added)), quoted in *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 561 (1996); see also *Long v. District Court*, 385 U.S. 192, 194 (1966) (per curiam) (describing the Court's holding in *Griffin* as a "fundamental principle").

140. 417 U.S. 600 (1974).

141. *Id.* at 607. In *M.L.B.*, the Court pointed out that six of the seven Justices in the *Davis* majority had the opportunity to overrule *Griffin* in *Ross* but instead upheld it. See *M.L.B.*, 117 S. Ct. at 569 n.16.

142. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 404 (1985) (describing *Griffin* as protecting a "vital" right); *Bearden v. Georgia*, 461 U.S. 660, 664-65 (1983) (relying on "*Griffin*'s principle of 'equal justice'"), quoted in *M.L.B.*, 117 S. Ct. at 569.

143. 430 U.S. 817 (1977).

144. *Id.* at 823 (quoting *Ross v. Moffitt*, 417 U.S. 610, 611, 615 (1974)).

that "the fundamental constitutional right of access to the courts" mandated meaningful access to adequate prison law libraries or qualified legal assistance.<sup>145</sup> The existence of *Bounds* is the real source of Justice Thomas's ire. Justice Thomas believes *Bounds*, like *Griffin* and *Douglas*, should be overruled.<sup>146</sup> He principally expressed this belief in another 1996 case, *Lewis v. Casey*.<sup>147</sup> In *Lewis*, the Court rejected a challenge to the Arizona prison library facilities, requiring proof of "actual injury."<sup>148</sup> *Lewis* limited *Bounds*, but did not overrule it. Obviously, the Court did not go far enough in *Lewis* for Justice Thomas: "*Bounds* was wrongly decided. . . . [T]he equal protection theory underlying *Griffin* and its progeny had largely been abandoned prior to *Bounds*."<sup>149</sup> Justice Thomas incorrectly equated *Davis*'s evisceration of disparate impact theory as it relates to suspect classes with the overruling of forty years of the Court's precedents about fundamental constitutional rights.<sup>150</sup> *M.L.B.*, however, suggests that *Griffin*'s fundamental right of access to the criminal process remains good law and that disparate impact theory is not dead.

For the first time in twenty years, a majority of the Court has limited *Davis*'s discriminatory purpose requirement. In doing so, *M.L.B.* has reinvigorated the equal protection rationale undergirding the *Griffin-Douglas* line of cases. Despite the murkiness of the *M.L.B.* Court's reasoning, the Court should use it to recognize a fundamental rights exception to *Davis*'s discriminatory purpose requirement. The fundamental rights exception has the potential to reestablish disparate impact theory as a means of combating the effects of wealth discrimination. How disparate impact theory will apply to other cases depends on several factors: (1) whether the Court explicitly recognizes a fundamental rights exception to *Davis*; (2) how far the Court is willing to extend the fundamental right of access to the criminal process; and (3) to what extent the *Griffin-Douglas-Bounds* line of cases remains good law. These are the issues the Court must confront if disparate impact theory is to become a viable legal argument for redressing wealth-based discrimination—not just for parental termination cases, but for the criminal justice system as well.

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145. *Id.* at 828.

146. See *M.L.B.*, 117 S. Ct. at 572 (Thomas, J. dissenting) ("As I stated last Term in *Lewis v. Casey*, I do not think that the equal protection theory underlying the *Griffin* line of cases remains viable. There, I expressed serious reservations as to the continuing vitality of *Bounds v. Smith*." (citations omitted)).

147. 116 S. Ct. 2174, 2186 (1996) (Thomas, J., concurring).

148. *Id.* at 2180 (majority opinion).

149. *Id.* at 2190-91 (Thomas, J., concurring).

150. See *id.* at 2191. Justice Thomas wrote: "In the years between *Douglas* and *Bounds* . . . we rejected a disparate impact theory of the Equal Protection Clause. . . . [T]he doctrinal basis for *Griffin* and its progeny has largely been undermined." *Id.*

## II. THE RIGHT TO COUNSEL AT CAPITAL STATE POSTCONVICTION REVIEW

If the Court recognizes a fundamental rights exception to *Davis's* discriminatory purpose requirement, *Griffin's* fundamental right of access to the criminal process could trigger strict scrutiny of state laws that fail to provide indigent death row inmates with counsel at state postconviction proceedings. This part argues that the Court, because it has limited successive federal habeas petitions, should ensure that death row inmates have counsel the first time through the process. It then contends that *Murray v. Giaratano*,<sup>151</sup> which failed to find a due process or Eighth Amendment right to counsel at capital state postconviction proceedings, should be overruled. Finally, it asserts that state postconviction hearings, like parental termination cases, are quasi-criminal and therefore should be protected under *Griffin's* fundamental right of access to the criminal process.

### A. The Court's First-Shot Death Penalty Jurisprudence

Last year, the execution rate in the United States reached a forty-year high.<sup>152</sup> The Court and Congress have helped the states accelerate the death penalty appeals process by limiting the number of successive federal habeas petitions.<sup>153</sup> The Court's philosophy essentially is that the capital appellate process is a one-shot deal. A convicted death row inmate gets one shot at each phase of the nine-step process that Professor Anthony Amsterdam has referred to as the "assembly line."<sup>154</sup>

The assembly line is breaking down at state postconviction review, among other places,<sup>155</sup> because some states refuse to provide indigent death row

151. 492 U.S. 1 (1989) (plurality opinion).

152. In 1997, 74 people were executed (half of the executions were in Texas), compared to 65 people in 1957. See Bob Herbert, *Death Penalty Dilemma*, N.Y. TIMES, Jan. 4, 1998, at A11.

153. See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1222 (codified at 28 U.S.C.A. § 2262 (West Supp. 1998)); *Felker v. Turpin*, 116 S. Ct. 2333, 2340 (1996) (upholding the section of the AEDPA that limits successive habeas petitions); *McCleskey v. Zant*, 499 U.S. 467, 489-96 (1991) (clamping down on "abuse[s] of the writ" in second or successive petitions).

154. Anthony G. Amsterdam, In *Favorem Mortis: The Supreme Court and Capital Punishment*, HUM. RTS., Winter 1987, at 14, 50. Amsterdam writes:

Capital criminal procedure is a long assembly line, with a long succession of inspectors. The assemblers at the front of the line commonly do a very poor job of assembly, and the inspectors at the front of the line all too often do an equally poor job of inspecting, with the result that later inspectors must repeatedly shunt products off the line, or return them to earlier points for reassembly.

*Id.* Justice Harry Blackmun has referred to this process as the "machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). The nine-part process is as follows: (1) trial; (2) direct appeal; (3) appeal to the U.S. Supreme Court for certiorari; (4) state habeas hearing; (5) state habeas appeal; (6) appeal to the U.S. Supreme Court for certiorari; (7) federal habeas hearing; (8) federal habeas appeal; and (9) appeal to the U.S. Supreme Court for certiorari.

155. Arguably, the biggest problem for indigents accused of capital crimes is incompetent counsel at trial. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for*

inmates with counsel.<sup>156</sup> Instead of rectifying the problem, the Court's most recent capital punishment jurisprudence has resorted to constitutional overkill. The Court has made it abundantly clear that successive federal habeas petitions will be rejected,<sup>157</sup> yet it continues to grant certiorari in death penalty cases in which an inmate is seeking a second shot.<sup>158</sup> Instead, the Court should focus on making the first shot count. Indigent death row inmates should be able to go through the entire appellate process one time with some minimum level of attorney competence and funding.<sup>159</sup> As part of this first-shot jurisprudence, the Court should reconsider *Murray v. Giarratano* through the post-*M.L.B.* lens of equal protection and carve out a right to counsel at capital state postconviction review.

#### B. *Murray v. Giarratano*

In 1989, a plurality of the Supreme Court held that death row inmates have no right to counsel at state postconviction proceedings, either under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.<sup>160</sup> The Equal Protection Clause received only cursory attention because of the discriminatory purpose requirement.<sup>161</sup> The respondents used equal protection to plead in the alternative.<sup>162</sup> Likewise, an equal protection argument was not given much consideration by scholars<sup>163</sup> or by the

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*the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

156. See *infra* notes 198-204 and accompanying text.

157. See *supra* note 153.

158. See, e.g., *Martinez-Villareal v. Stewart*, 66 U.S.L.W. 3157 (U.S. Oct. 14, 1997) (No. 97-300), *granting cert. to* 118 F.3d 625 (9th Cir.) (concerning whether the AEDPA prevents a death row inmate from filing a second federal habeas petition to address his mental competency to be executed); *Thompson v. Calderon*, 66 U.S.L.W. 3177 (U.S. Aug. 26, 1997) (No. 97-215), *granting cert. to* 120 F.3d 1045 (9th Cir. 1997) (en banc) (deciding whether, after a first federal habeas petition is final, a federal court of appeals can vote to rehear a case). *But cf.* *Lonchar v. Thomas*, 116 S. Ct. 1293, 1301 (1996) (holding that a death row inmate's first federal habeas petition must be heard on the merits even if it is filed at the "eleventh hour").

159. This definition of equality is based on Professor Frank Michelman's ideas about "just wants" and "minimum protection." Michelman, *supra* note 45, at 13.

160. See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

161. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting, just two years before *Giarratano*, a race-based challenge to the death penalty as lacking a showing of discriminatory purpose); *Washington v. Davis*, 426 U.S. 229 (1976).

162. See Brief for Respondents at 45, *Giarratano* (No. 88-411). The brief argued:

In the Courts below, Plaintiffs consistently argued that the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment, and the Suspension Clause of Article I all require a state to provide Death Row inmates with lawyers to represent them in state postconviction proceedings. Although neither the district court nor the Fourth Circuit addressed these grounds, each provides an independent basis for affirming the judgment below.

*Id.* (citations omitted).

163. Several scholars, however, called for a combined due process-equal protection argument. See Michael A. Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989) (describing the right to counsel as a "complex" right rooted in the Sixth, Eighth, and Fourteenth Amendments); Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*,

*Giarratano* Court.<sup>164</sup> In light of *M.L.B.*, *Giarratano* is due for an equal protection reexamination.

### 1. *The Holding*

In 1985, Joseph M. Giarratano, a Virginia prisoner sentenced to death, filed a civil rights lawsuit on behalf of death row inmates who could not afford attorneys to represent them at state postconviction hearings. This class action suit was prompted by Giarratano's efforts to find a lawyer for Earl Washington, Jr., an indigent and mentally retarded inmate who was scheduled to be executed.<sup>165</sup> Washington had not exhausted his postconviction remedies because the state had denied his request for an attorney. Under Virginia law, the judge had the discretion not to appoint counsel for capital state postconviction review unless the inmate could make a showing of "non-frivolous claims."<sup>166</sup> The Supreme Court upheld the constitutionality of the Virginia law on several grounds.

One lesson from *Giarratano* is that the right to counsel is not as extensive as the right of access to the criminal process.<sup>167</sup> The *Giarratano* Court rejected the lower court's argument that the right of meaningful access found in *Bounds v. Smith*<sup>168</sup> controlled the case.<sup>169</sup> The Court said *Giarratano* was controlled instead by *Pennsylvania v. Finley*,<sup>170</sup> a noncapital case in which the Court held that the state was not required to have postconviction review at all, much less provide counsel.<sup>171</sup> The *Giarratano* Court refused

48 MD. L. REV. 455 (1989) (advocating a consolidated equal protection-due process liberty interest but relying more heavily on due process).

164. The Court's holding did not address equal protection: "We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases." *Giarratano*, 492 U.S. at 10. It did, however, reject *Bounds*'s equal protection right of meaningful access. *See id.* at 7.

165. Giarratano, who later published an essay in the *Yale Law Journal*, *see* Joseph M. Giarratano, "To the Best of Our Knowledge, We Have Never Been Wrong": Fallibility vs. Finality in Capital Punishment, 100 YALE L.J. 1005 (1991), was acting as a pro se attorney. *See* Colman McCarthy, *Cons Teach Cons Peace; Inmate Joseph Giarratano, a Non-Violence Advocate*, PROGRESSIVE, July 1997, at 23. Both Giarratano and Washington eventually received counsel and had their death sentences commuted to life in prison. Giarratano has taught other prisoners about alternatives to violence in courses that garnered media attention but annoyed prison officials, who transferred him to prisons in Utah and Illinois. *See id.*

166. Brief for Petitioners at 6, *Giarratano* (No. 88-411). This requirement was a catch-22 for mentally retarded petitioners such as Washington, who lacked the mental capacity to state a non-frivolous claim without counsel.

167. *Cf.* *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 562 (1996) ("In contrast to the 'flat prohibition' of 'bolted doors' that the *Griffin* line of cases securely established, the right to counsel at state expense, as delineated in our decisions, is less encompassing.").

168. 430 U.S. 817 (1977); *see supra* text accompanying notes 144-145.

169. *See Giarratano*, 492 U.S. at 6-7.

170. 481 U.S. 551 (1987).

171. Chief Justice Rehnquist wrote for the *Giarratano* plurality: "In *Finley* we ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access' required the State to appoint counsel for indigent prisoners seeking state postconviction relief." 492 U.S. at 7.

to distinguish between capital and noncapital cases, rejecting the respondents' arguments that the states were required to provide counsel because of the Eighth Amendment's "evolving standards of decency"<sup>172</sup> and the need for accuracy in capital cases under the Due Process Clause.<sup>173</sup>

## 2. *The Importance of State Postconviction Review*

State postconviction review is the autopsy of a capital trial. The median state postconviction case requires about 600 hours of legal work.<sup>174</sup> It is the first opportunity to pursue claims such as ineffective assistance of counsel and the last opportunity to investigate fact-intensive claims such as actual innocence and prosecutorial misconduct.

Since *Giarratano* was decided eight years ago, the importance of providing counsel for capital state postconviction proceedings has increased. First, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,<sup>175</sup> which erects a number of procedural barriers to federal habeas review. In addition to banning successive federal habeas petitions, the AEDPA places an unprecedented statute of limitations on filing petitions and eliminates the federal courts' *de novo* standard of review.<sup>176</sup> The Act also attempts to induce the states to provide counsel at capital state postconviction proceedings by offering an even shorter statute of limitations on federal habeas petitions if the states "opt-in."<sup>177</sup> No federal court has found that a state has complied by providing adequate levels of funding and counsel.<sup>178</sup>

Second, Congress eliminated funding for the Postconviction Defender Organizations (PCDOs) that have represented indigent capital inmates at state

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172. *Id.* at 8 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

173. *See id.* at 10.

174. A 1987 American Bar Association survey found lawyers spending over 600 hours on state postconviction proceedings, more than double the amount of time spent on any other part of the appellate process. *See* Brief of the American Bar Association at 34, *Giarratano* (No. 88-411); Richard J. Wilson & Robert L. Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336 (1989).

175. Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C.A. §§ 2261-2266 (West Supp. 1998)).

176. *See id.* § 107(a), 110 Stat. at 1223 (codified at 28 U.S.C.A. § 2264). Under the new standard of review, any facts or claims not preserved in a death row inmate's state habeas petition will be procedurally barred at the federal level.

177. Congress will halve the statute of limitations from 360 to 180 days if the states provide counsel at capital postconviction hearings. *See id.* § 107(a), 110 Stat. at 1221, 1223 (codified at 28 U.S.C.A. §§ 2261, 2263).

178. *See, e.g., Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996) (enjoining Florida from asserting in any state or federal proceeding that it has complied with the opt-in requirements). *Compare Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir. 1997) (upholding the district court's finding that California has not yet complied with the opt-in provisions), *with Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997) (overruling the lower court's decision that the state had not complied, but only on procedural grounds). *See generally* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 395 n.45 (1996) (predicting that the incentives would fail and be the focus of litigation).

postconviction proceedings.<sup>179</sup> In *McFarland v. Scott*,<sup>180</sup> the Court affirmed that indigent death row inmates have a right to counsel at federal habeas hearings,<sup>181</sup> but, without counsel at the state level, their constitutional claims will not be preserved for federal review. Federal courts currently find errors in over forty percent<sup>182</sup> of all capital cases; at one time errors were found in over seventy percent.<sup>183</sup>

Finally, in February 1997 the American Bar Association (ABA) responded to these changes by calling for a moratorium on the death penalty until the situation improves.<sup>184</sup> Like the ABA resolution, this Note takes no position on the morality of the death penalty. Given that capital punishment is a reality, however, this Note argues that the Court needs to give death row inmates a meaningful first show by reconsidering *Giarratano* in the context of *M.L.B.* and the proposed fundamental rights exception.

Any challenge to *Giarratano* faces a formidable series of precedents.<sup>185</sup> The concurring opinion of Justice Kennedy, however, provides a ray of hope. As the critical fifth vote, Justice Kennedy concurred in the judgment but refused to join the *Giarratano* Court's plurality opinion, writing separately to convey his ambivalence. Justice Kennedy recognized the importance of providing counsel at capital state postconviction proceedings:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death . . . . [A] substantial proportion of those prisoners succeed in having their death

179. About 20 PCDOs lost congressional funding as of September 30, 1996. Some PCDOs have closed, and some have subsisted through state funding and by cutting back on their staffs. See generally Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996).

180. 512 U.S. 849 (1994).

181. In 1988, Congress extended the right to counsel to indigent death row inmates seeking federal habeas review. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4181, 4393-94 (codified at 21 U.S.C. § 848(q)(4)(B) (1994)). The Court held that the right to counsel begins before a formal federal habeas petition is filed and that the request for counsel is grounds for a stay of execution. See *McFarland*, 512 U.S. at 854-58; cf. Steven M. Latino, Note, *Reversing Twenty Years of Supreme Court Postconviction Jurisprudence: Enlarging the Indigent Capital Defendant's Right to Postconviction Counsel* in *McFarland v. Scott*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 327, 358-59 (1996) (questioning the Court's decision).

182. From 1976 to 1991, death row inmates secured relief in 47% of habeas cases. Only a small percentage of noncapital inmates receive habeas relief. See Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 526 (1996); see also Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 25 (1996) (placing the percentage of constitutional errors at 46%).

183. From 1976 to 1983, federal appellate courts discovered constitutional errors in 73.2% of habeas petitions submitted by capital defendants, compared to only 6.5% of non capital habeas appeals. Out of 41 cases from 1976 to 1983, the federal appellate courts found constitutional errors in 30. See Amsterdam, *supra* note 154, at 51; Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 527 (1988).

184. See *Bar Association Leaders Urge Moratorium on Death Penalty*, N.Y. TIMES, Feb. 4, 1997, at A20.

185. See *supra* Subsection II.B.1.



sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of a person learned in the law.<sup>186</sup>

Justice Kennedy, however, wrote that providing counsel was not up to the Court. He agreed with Justice O'Connor to defer to "state legislators and prison administrators" to maintain *Bounds's* right of meaningful access.<sup>187</sup> He also expected the ABA, the Judicial Conference of the United States, and Congress "to give the matter [of counsel at state postconviction] serious consideration."<sup>188</sup> Ultimately, Justice Kennedy found no constitutional violations in *Giarratano* because there was no actual injury: "While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, *no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings.*"<sup>189</sup> The case of Exzavious Lee Gibson, however, is the proof of injury that could change Justice Kennedy's mind.

### C. *The Case of Exzavious Lee Gibson*

Twenty-four years old, indigent, and with an I.Q. of seventy-six, Gibson was the "first capital habeas petitioner in any state in the modern era of the death penalty to be forced to proceed without counsel at his habeas evidentiary hearing."<sup>190</sup> Gibson was sentenced to death for robbing and killing a sixty-nine-year-old grocer.<sup>191</sup> The Georgia Supreme Court denied Gibson's direct appeal, and the U.S. Supreme Court denied his petition for certiorari.<sup>192</sup> Gibson's state postconviction review received national media attention.<sup>193</sup>

On September 24, 1996, two weeks before a Mississippi attorney presented Melissa Lumpkin Brooks's oral argument before the Supreme Court,<sup>194</sup> Gibson was all alone at his state postconviction hearing at the Jackson State Prison. Paige Reese Whitaker, an assistant state's attorney, represented the

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186. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (citation omitted).

187. *Id.*

188. *Id.*

189. *Id.* (emphasis added).

190. Application for Certificate of Probable Cause to Appeal at 2, *Gibson v. Turpin* (Butts County Sup. Ct., Ga. May 27, 1997) (No. 95-V-648).

191. Gibson allegedly stabbed the man 39 times. A woman who had seen Gibson running from the scene led police to his home. A trail of fresh blood led to Gibson's room, where police found him cowering in the closet. It came out at trial and at Gibson's state habeas hearing that Gibson's mother had been murdered, his father was absent, and the aunt who raised Gibson had abused him. See Woolner, *Condemned*, *supra* note 9.

192. See *Gibson v. State*, 404 S.E.2d 781 (Ga. 1991), *cert. denied*, 502 U.S. 1101, and *reh'g denied*, 503 U.S. 999 (1992).

193. See sources cited *supra* note 9.

194. See Transcript of Oral Argument, *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996) (No. 95-853).

State of Georgia. Because the state refused to appoint him counsel, Gibson represented himself. On several occasions, Butts County Superior Court Judge Carlisle Overstreet asked Gibson if he had any evidence to introduce. Gibson variously replied, "I don't know what to plead," "I don't have an attorney," and "I am not waiving my rights."<sup>195</sup> Elizabeth Wells, a Georgia Appellate and Educational Resource Center attorney who was standing in the gallery, asked the judge for more time so her organization could represent him. The judge denied Wells's request but said she could sit at the counsel's table with Gibson. Wells, who said she had not read the trial record, balked at what she called "an empty offer."<sup>196</sup> The hearing continued. Gibson did not introduce any evidence. He asked no questions of his trial counsel, his only witness.<sup>197</sup>

Georgia is one of two death penalty states that do not provide their capital defendants with counsel at state postconviction hearings.<sup>198</sup> That does not mean Gibson's case was an isolated problem.<sup>199</sup> In the thirty-six other death-penalty states, counsel is appointed only upon request or erratically at the discretion of the judge or the public defender.<sup>200</sup> In many cases, the appointment of counsel makes no practical difference, because states provide insufficient funds for attorney's fees and reimbursement expenses. For

195. Application for Certificate of Probable Cause to Appeal at 8, *Gibson* (No. 95-V-648).

196. Rankin, *supra* note 9; *see id.* ("We don't think that the system benefits by having this inmate go through without counsel," Wells said. "We think that it makes a mockery of the system . . . Mr. Gibson may as well be hung up from a tree out back.""). Wells was removed from the courtroom for her outbursts. *See Woolner, Condemned, supra* note 9.

197. *See Herbert, supra* note 9. Gibson filed a skeletal, pro se habeas petition alleging ineffective assistance of counsel at trial. The petition was the idea of Wells's Georgia Resource Center in order to toll the statute of limitations before several new state habeas laws took effect. *See Application for Certificate of Probable Cause to Appeal at 3, Gibson* (No. 95-V-648). The Georgia Resource Center, citing the loss of congressional funding, said it could not represent Gibson because it had cut back its lawyers from eight to two. *See Woolner, Condemned, supra* note 9. Whitaker, the state's attorney, claimed that Wells had set up Gibson as a test case in order to challenge Georgia's policy. At the end of the hearing, Judge Overstreet asked Whitaker if there was anything Gibson should be instructed on before the hearing was adjourned. Whitaker said: "I think Mr. Gibson should be aware that this is his first habeas corpus proceeding, and that if he chooses to file another one, anything that he doesn't raise in this one is going to probably be found to be waived under Georgia law." *Id.* In March, Judge Overstreet signed a 49-page order written entirely by the state that rejected Gibson's request for counsel. *See Application for Certificate of Probable Cause to Appeal at 12, Gibson* (No. 95-V-648).

198. *See THE SPANGENBERG GROUP, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POST-CONVICTION DEATH PENALTY CASES 20-21, 80 (A.B.A. Postconviction Death Penalty Representation Project, 1996) [hereinafter A.B.A. POSTCONVICTION PROJECT].* The other, Wyoming, currently has no one on death row. *See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2* (1997). In Georgia, the state supreme court has held that no right to counsel exists at any state habeas hearing. *See Hopkins v. Hopper*, 215 S.E.2d 241, 243 (Ga. 1975). Georgia's failure to provide counsel at capital state postconviction has been challenged before. In 1978, a federal judge ruled that Georgia had violated *Bounds*'s right of meaningful access, but the Fifth Circuit refused to decide the case until the state supreme court had ruled on the issue. *See Gibson v. Jackson*, 443 F. Supp. 239, 248-50 (Ga. 1977), *vacated*, 578 F.2d 1045 (5th Cir. 1978). (The death row inmate in that case bore no relation to Exzavious Gibson.)

199. *See, e.g., Case Highlights Death Row Debate*, FLA. TIMES UNION, Aug. 29, 1997, at B1 (recounting the case of Timothy Don Carr, a Georgia death row inmate who could not afford counsel and missed the deadline for his direct appeal to the U.S. Supreme Court).

200. *See A.B.A. POSTCONVICTION PROJECT, supra* note 198, at 81-83.

example, in Mississippi, there is no right to counsel, but a combined total of \$2000 is allotted for attorney's fees at the trial, direct review, and postconviction phases.<sup>201</sup> By the time a capital defendant gets to the postconviction stage, there is almost certainly no money left for attorney's fees and expenses.<sup>202</sup> Furthermore, the Mississippi PCDO has closed because of the loss of federal funding.<sup>203</sup> Efforts in the Mississippi state legislature to provide mandatory counsel have been defeated three years running.<sup>204</sup>

Gibson's case is an appropriate symbol and a point of departure from which to make a wealth-based disparate impact argument for overruling *Murray v. Giarrratano*. Although the weight of the *Giarrratano* precedent is heavy, *M.L.B.*, decided three months after Gibson's hearing, provides a possible lever with which to overturn it.

#### D. Applying M.L.B.

This section argues that the Court should recognize a fundamental rights exception to Davis's discriminatory purpose requirement and apply *M.L.B.*'s equal protection analysis to the right to counsel at capital state postconviction proceedings. The Court probably would have to fit the right to counsel under *Griffin*'s right of access to the criminal process. In 1989, the *Giarrratano* Court rejected the analogy to *Bounds*'s right of meaningful access that provided access to prison law libraries or equivalent legal assistance. In reconsidering *Giarrratano*, therefore, emphasis cannot be placed solely on *Bounds*. Gibson's right of access would need to rest on other cases.

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201. See *id.* at 38.

202. The most common claim by death row inmates is ineffective assistance of counsel at trial, which is impossible to make without a new lawyer at postconviction. Gibson's new lawyers are arguing that because state habeas review was the first time he could litigate ineffective assistance, Gibson should have been provided with counsel. See Application for Certificate of Probable Cause to Appeal at 33-34, *Gibson* (No. 95-V-648); cf. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (holding that since there is no right to counsel at state habeas review, there can be no ineffective assistance of counsel); *Kimmelman v. Morrison*, 477 U.S. 365, 373-83 (1986) (refusing to limit habeas review of ineffective assistance); *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (establishing performance and prejudice prongs to prove ineffective assistance).

203. See A.B.A. POSTCONVICTION PROJECT, *supra* note 198, at 39.

204. See *id.* A Washington, D.C., law firm has filed a federal civil rights lawsuit challenging Mississippi's failure to provide counsel. See Complaint, *Russell v. Puckett*, No. 97cv596WS (S.D. Miss. filed Aug. 21, 1997); Marcia Coyle, *A Lawyer for Every Death Plea?*, NAT'L L.J., Sept. 1, 1997, at A1. In that case, which concerns a mentally retarded man convicted in 1990 of killing of prison guard, the petitioners have argued that Mississippi's death row inmates are mentally incapable of representing themselves. The petitioners' pro bono lawyers, Jenner & Block's Washington office, conducted a study with the Southern Poverty Law Center of Mississippi's death row population that concluded that the average I.Q. of Mississippi death-row inmates is 81, two points above borderline mental retardation. See *Russell*, No. 97cv596WS, at 12-15.

## 1. *Lewis v. Casey and Actual Injury*

The most recent precedent favoring Exzavious Gibson's right of access is *Lewis v. Casey*.<sup>205</sup> Although *Lewis* limited *Bounds* by rejecting a challenge to Arizona prison library facilities, it would help Gibson's case by requiring "actual injury."<sup>206</sup> The *Lewis* Court's actual injury requirement is consistent with the Court's capital punishment jurisprudence regarding the postconviction right to counsel, mirroring Justice Kennedy's concerns in *Giarratano* that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings."<sup>207</sup>

Gibson's case satisfies the actual injury requirement. Gibson was the first death row inmate in Georgia to have a state postconviction hearing without the requested benefit of counsel, and the Court has recognized the importance of counsel at postconviction.<sup>208</sup> Without a successful appeal, Gibson's legal claims have been procedurally barred at the federal level because he failed to preserve them at the state level by calling witnesses, raising constitutional errors, and adding to the factual record. Thus, Gibson effectively waived any chance of having meaningful federal habeas review of his case.<sup>209</sup>

## 2. *Williams v. Illinois*

The Court could rely on *M.L.B.*'s muddled analysis of *Williams v. Illinois*.<sup>210</sup> In both *Williams* and *Gibson*, the states discriminated against the indigent as a class of people. In *Williams*, indigency prevented inmates from paying fines and forced them to serve terms beyond the statutory maximum. In cases such as Gibson's, the lack of counsel prevents inmates from exercising their state and federal postconviction remedies. If it is indeed the case that about ninety-nine percent of death row inmates are indigent,<sup>211</sup> Georgia is discriminating against nearly all of its death row inmates. By making its postconviction proceedings "wholly contingent on one's ability to

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205. 116 S. Ct. 2174 (1996).

206. *Id.* at 2180. Justice Scalia wrote for the *Lewis* Court: "Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone,' and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Id.* (quoting *Bounds v. Smith*, 430 U.S. 817, 823 (1977)).

207. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment).

208. *See* *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994) (quoting *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment)).

209. *See supra* note 197.

210. 399 U.S. 235 (1970).

211. That figure is based on a mid-1980s ABA study. *See* Mello, *supra* note 183, at 516; cf. Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 70 (1989) ("It has been estimated that approximately ninety percent of those on death row could not afford to hire a lawyer when they were tried.").

pay,”<sup>212</sup> Georgia is treating its death row inmates in the same way that the Court objected to in *Williams* and *M.L.B.*

### 3. Ex Parte Hull and Griffin

Two other pre-*Bounds* cases also buttress Gibson’s argument: *Griffin v. Illinois*<sup>213</sup> and *Ex parte Hull*.<sup>214</sup> In *Ex parte Hull*, a state prison’s “screening process” prevented inmates from filing federal habeas and civil rights lawsuits. The *Hull* Court held that there was a right to physical access and that the screening of federal petitions was forbidden.<sup>215</sup> Yet, by not providing counsel, Georgia is effectively screening which death row inmates may seek federal habeas review based on their indigency. Justice Souter’s separate opinion in *Lewis* recognized that “the need for some form of legal assistance is even more obvious now than it was then, because the restrictions developed since *Bounds* have created a ‘substantial risk’ that prisoners proceeding without legal assistance will never be able to obtain review of the merits of their claims.”<sup>216</sup> With his habeas remedies severely limited by Congress and the right to counsel nonexistent in Georgia, Gibson is, in effect, physically barred from obtaining a meaningful federal review of his case.

Consistent with its holding in *M.L.B.*, the Court should rely principally on *Griffin*. The *M.L.B.* Court pointed out that *Griffin*’s fundamental right of access to the criminal process is still good law.<sup>217</sup> Even Justice Thomas has recognized *Bounds*’s potent combination of *Hull* and *Griffin*: “By detaching *Griffin*’s right to equal access and *Ex parte Hull*’s right to physical access from the reasoning on which each of these rights was based, the *Bounds* Court created a virtually limitless right.”<sup>218</sup> *Griffin* and *M.L.B.* are limited in their application to Gibson’s case, however, in that *Griffin*’s right of access usually applies only to criminal cases.

### E. Labeling State Postconviction Quasi-Criminal

To fit Gibson’s case under *Griffin*’s fundamental right of access to the criminal process, state postconviction review must be labeled quasi-criminal. Capital postconviction hearings are considered civil because they are initiated by the inmate, not by the state. In *Giarratano*, Justice O’Connor refused to

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212. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 569 (1996).

213. 351 U.S. 12 (1956) (plurality opinion).

214. 312 U.S. 546 (1941).

215. *See id.* at 549.

216. *Lewis v. Casey*, 116 S. Ct. 2174, 2205 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

217. *See M.L.B.*, 117 S. Ct. at 560.

218. *Lewis*, 116 S. Ct. at 2195 (Thomas, J., concurring).

provide relief in part because there is no right to counsel in civil cases.<sup>219</sup> There is also no right to access in civil cases. In the past, *Griffin's* right of access has applied mostly to criminal cases.<sup>220</sup> *M.L.B.*, however, bridged the civil-criminal gap that bothered Justice O'Connor by quoting *Mayer v. City of Chicago* and extending *Griffin's* right of access to cases "quasi criminal in nature."<sup>221</sup> *M.L.B.* held that Brooks's parental termination case was quasi-criminal because it was "barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss she faces."<sup>222</sup>

If the magnitude and permanence of the loss is the primary criterion, then a death row inmate's postconviction hearing similarly should be labeled quasi-criminal. In *McFarland v. Scott*,<sup>223</sup> the Court upheld congressional legislation providing counsel at federal habeas because it reflected "a determination that quality legal representation is necessary in capital habeas proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'"<sup>224</sup> Labeling death penalty appeals civil obfuscates the life and liberty interests at stake. Gibson's case is as much as or even more like a criminal case than the parental termination case in *M.L.B.* The threat of the loss of life should enable capital postconviction appeals to be labeled quasi-criminal and fall under the *Griffin-Mayer-M.L.B.* line of cases.

Another factor in labeling postconviction proceedings quasi-criminal is the risk of error. In *M.L.B.*, the petitioners pointed out that, of the eight appellate challenges to parental termination decisions in Mississippi from 1980 to 1996, the state supreme court reversed three.<sup>225</sup> That 37.5% risk of error was a factor in the Court's decision to provide Brooks with a free transcript. Similarly, federal courts continue to find constitutional violations in 47% of capital cases; at one time, the number was as high as 73%.<sup>226</sup>

Disregarding the magnitude and permanence of the harm and risk of error, Justice Thomas's *M.L.B.* dissent ignores the effect of the government's monopoly power on the individual interests at stake. The logic for Justice Thomas is very simple: If the state is not required to have appeals, then it

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219. See *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) ("[T]here is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment."); see also *Fay v. Noia*, 372 U.S. 391, 423-24 (1963) (recognizing postconviction review as civil in nature).

220. See *supra* text accompanying note 8.

221. *M.L.B.*, 117 S. Ct. at 561 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971)).

222. *Id.* at 565.

223. 512 U.S. 849 (1994).

224. *Id.* at 855 (quoting 21 U.S.C. § 848(q)(7) (1994)).

225. See *M.L.B.*, 117 S. Ct. at 560 n.3.

226. See *supra* notes 182-183 and accompanying text. According to the Death Penalty Information Center, 21 death row prisoners were exonerated by the courts between 1993 and 1997, and there have been 69 wrongful convictions of people sentenced to death since 1973. See David E. Rovella, *Danger of Executing the Innocent on the Rise*, NAT'L L.J., Aug. 4, 1997, at A7.

should not be required to pay for them.<sup>227</sup> Justice Thomas effectively borrowed Justice Harlan's analogy about the difference between excluding indigents from a free state university (disparate treatment) and forcing them to pay tuition (disparate impact).<sup>228</sup> The difference, however, is that the state is not *forcing* anyone to seek an education at a state university.

Thomas's dissent also overlooks the government's monopoly on access to the judicial and political processes.<sup>229</sup> The Court has distinguished between the effect of a governmental monopoly and an affirmative right to governmental assistance.<sup>230</sup> This monopoly extends to the states' administration of capital punishment. Gibson's capital postconviction hearing was not his choice. Georgia imposed the ultimate sentence of death, and Gibson had no alternatives besides the state's judicial process. The governmental monopoly over the judicial process makes it imperative that the Court recognize a fundamental rights exception and provide a right to counsel at capital state postconviction review based on *Griffin's* right of access.

#### F. *Hurdles to Federal Intervention*

##### 1. *History, Transcript Fees, and the Right to Counsel*

Recent history suggests that the right of access is broader for transcript fees than it is for the right to counsel. *Ross v. Moffitt*<sup>231</sup> limited the right to counsel to first appeals as of right, refusing to extend it to discretionary appeals.<sup>232</sup> The Court again refused to find a general right to counsel for noncapital postconviction cases in *Pennsylvania v. Finley*,<sup>233</sup> and it relied on

227. Justice Thomas wrote:

I see no principled difference between a facially neutral rule that serves in some cases to prevent persons from availing themselves of state employment, or a state-funded education, or a state-funded abortion—each of which the State may, but is not required to, provide—and a facially neutral rule that prevents a person from taking an appeal that is available only because the State chooses to provide it.

*M.L.B.*, 117 S. Ct. at 574 (Thomas, J., dissenting).

228. See *Douglas v. California*, 372 U.S. 353, 361-62 (1963) (Harlan, J., dissenting). Justice Harlan wrote:

Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses.

*Id.*

229. See *supra* text accompanying note 124.

230. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court refused to force states to fund nontherapeutic abortions, but the Court distinguished abortion cases based on personal choice, from those involving *Griffin's* right of access to the criminal process, which implicates "a governmental monopoly in which participation is compelled." *Id.* at 471 n.6.

231. 417 U.S. 600 (1974).

232. See *id.* at 610.

233. 481 U.S. 551 (1987); see also *supra* notes 170-171 and accompanying text.

*Finley* rather than *Bounds* as the controlling case in *Giarratano*. *Giarratano*, meanwhile, firmly established that the right to counsel is not as extensive as the right to transcript fees under the right of meaningful access.<sup>234</sup>

The history of the right to counsel before *Gideon v. Wainwright*,<sup>235</sup> however, demonstrates that the Court believed capital cases to be different, and to implicate greater concerns, than other types of cases. Over thirty years before *Gideon*, the Court reversed the death sentences of the Scottsboro Boys, seven young black men accused of raping two white women, because the state failed to appoint them counsel until the morning of the trial.<sup>236</sup> In *Griffin*, Justice Frankfurter wrote that "a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse."<sup>237</sup> Justice Frankfurter, however, assumed a different tone when discussing death sentences: "Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others."<sup>238</sup> Although absolute equality is not required, denying Gibson counsel at state postconviction proceedings is an "absolute deprivation"<sup>239</sup> of his right of access to the criminal process.

## 2. *Due Process Versus Equal Protection Fundamental Rights*

There are two reasons that the Court should find a right to counsel at capital state postconviction proceedings under the Equal Protection Clause, but not under the Due Process Clause. Due process rights alleviating the effects of wealth discrimination are even more limited than equal protection rights.<sup>240</sup> Part of the reason, Justice Scalia has suggested, is that fundamental equal protection rights are "counterhistorical,"<sup>241</sup> not as deeply rooted in history,

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234. See *Murray v. Giarratano*, 492 U.S. 1, 7-8 (1989) (plurality opinion).

235. 372 U.S. 335 (1963).

236. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932). The Court said:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

*Id.*

237. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment).

238. *Id.* at 21.

239. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973) (refusing to strike down property-tax funding of public schools because the system did not result in an absolute deprivation of public education).

240. See *supra* text accompanying notes 79-82.

241. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring in the judgment) ("The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land,' and might be thought to have some counterhistorical content."). Justice Scalia's explanation supported *Williams v. Illinois*, 399 U.S. 235 (1970), one of *M.L.B.*'s principal precedents.



tradition, and precedent as due process rights. The Court<sup>242</sup> and scholars<sup>243</sup> have echoed Justice Scalia's counterhistorical claim.

Our constitutional standards confirm that the Due Process Clause is more wedded than the Equal Protection Clause to history and tradition. A fundamental due process right not explicitly mentioned in the Constitution must be (1) "so implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [it] were sacrificed";<sup>244</sup> or (2) "deeply rooted in this Nation's history and tradition."<sup>245</sup> By contrast, equal protection fundamental rights must be "explicitly or implicitly protected by the Constitution."<sup>246</sup> These implicit protections have enabled equal protection to adapt to our changing ideas about race relations, the right to vote, the right to travel, and the right of access to the criminal justice system. It also can adapt to our changing ideas about the death penalty appeals process.<sup>247</sup>

The Court is also more likely to find a fundamental right under equal protection than due process because equal protection assuages the Court's concerns about stare decisis.<sup>248</sup> In recent years, the Court has been more willing to ignore stare decisis in cases involving equal protection<sup>249</sup> than in cases involving substantive due process.<sup>250</sup> The Court's recent stare decisis jurisprudence seems to confirm Justice Scalia's notions about equal protection being more counterhistorical than due process.

242. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court declared:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

*Id.* at 669 (citations omitted).

243. See, e.g., Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) ("From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. . . . The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.").

244. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

245. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

246. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

247. Cass Sunstein suggests that the fundamental rights strand of equal protection is meant to trigger strict scrutiny "where politically weak groups are at risk." Cass R. Sunstein, *The Right To Die*, 106 YALE L.J. 1123, 1155 (1997). This idea echoes the *Carolene Products* footnote that calls for heightened scrutiny in protecting political processes relied on by "discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

248. To provide counsel at state postconviction proceedings, the Court would have to overrule *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion), and limit *Pennsylvania v. Finley*, 481 U.S. 551 (1987). But *McFarland v. Scott*, 512 U.S. 849, 858 (1994), upheld the right to counsel at capital federal habeas review and could be interpreted as the appropriate precedent to follow in light of the recent habeas reforms.

249. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231-32 (1995) (overruling an equal protection case, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

250. See *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) (holding that stare decisis requires reaffirming abortion rights set forth in *Roe v. Wade*, 410 U.S. 113 (1973)).

### 3. Federalism Concerns

Equal protection fundamental rights also trigger fewer federalism concerns.<sup>251</sup> Under an equal protection rationale, the Court would not be telling the states to abandon either capital punishment or state postconviction review. Instead, the Court would be forbidding states from erecting procedures that jeopardize the fundamental rights of the poor. In *M.L.B.*, the Court considered two main factors in applying equal protection analysis: (1) "the character and intensity of the individual interest at stake"; and (2) "the State's justification for its exaction."<sup>252</sup> Concerning the effect of wealth discrimination, most states can satisfy rationality review because they have a legitimate interest in reducing the financial burden on their residents. This is why it is so important that the state law in Gibson's case "impinges upon a fundamental right explicitly or implicitly protected by the Constitution."<sup>253</sup> The fundamental right enables the Court to limit *Davis's* discriminatory purpose requirement, apply strict scrutiny, and more easily overcome any federalism concerns.

The Rehnquist Court is extremely concerned with issues of federalism.<sup>254</sup> Forcing Mississippi to provide free transcripts in parental termination cases is a small financial intrusion on state power. On the other hand, telling all thirty-six capital punishment states that they have to provide counsel at state postconviction proceedings for all indigent death row inmates is tantamount to acting like a "super-legislature."<sup>255</sup>

Three additional explanations, however, may mollify the Court's potential federalism concerns. First, forcing the states to provide counsel may actually decrease rather than increase federal intrusion on state power.<sup>256</sup> If death row inmates have counsel at state postconviction review, there will be fewer

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251. See Sunstein, *supra* note 247, at 1155. Sunstein writes:

Perhaps the idea is that the fundamental rights branch of equal protection doctrine is less intrusive than substantive due process because it leaves states more room to maneuver by permitting them to invade the relevant right so long as they do so on a nondiscriminatory basis. This is not entirely implausible . . . .

*Id.*

252. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996); see also *Bearden v. Georgia*, 461 U.S. 660, 666-67 (1983) (stating the importance of examining both the individual interest at stake as well as the legislative purpose).

253. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

254. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down a federal law under the Commerce Clause for the first time in over 50 years). In the past, the Rehnquist Court has deferred to Congress and the state legislatures on the issue of counsel at capital state postconviction review. Congress has failed to nudge the state legislatures into action. See *supra* notes 177-178 and accompanying text.

255. *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); accord *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

256. This was one of the arguments devised by Clarence Earl Gideon's appointed counsel, Abe Fortas, and Fortas's then-summer associate, John Hart Ely. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 123-24 (1964) (discussing Ely's argument that "an absolute requirement of counsel might be less of an intrusion . . . because it would be clear-cut"). Gideon's case convinced a unanimous Court to declare that the states must provide counsel at felony trials. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

successive federal habeas petitions because the inmates will have received every opportunity to pursue their claims. Thus, the federal courts can return death penalty cases to the states in a speedier fashion. This is true both as a practical matter and as a statutory matter, because congressional habeas reforms have shortened the statutes of limitations on federal habeas petitions if the states provide counsel at postconviction review.<sup>257</sup> Second, the federal government could provide indigents with counsel at capital state postconviction proceedings. The same counsel appointed with congressional funding at federal habeas review<sup>258</sup> could assist indigent inmates at state habeas review. Although this would undoubtedly place a greater burden on the federal budget, it would increase the efficiency of the capital postconviction process by having the same lawyer at state and federal habeas proceedings. Finally, the Court should cast aside its federalism concerns when it comes to the death penalty because the Court traditionally has taken a hands-on approach in shaping this country's approach to capital punishment.

#### G. *First-Shot Jurisprudence Revisited*

The most disappointing aspect of the *Giarratano* Court's opinion was its refusal to distinguish between capital and noncapital cases.<sup>259</sup> Since 1976, the Court has been the architect of this country's death penalty assembly line.<sup>260</sup> The Court's legitimacy as the arbiter of countermajoritarian rights is at stake when it ignores the impact of its recent death penalty jurisprudence.<sup>261</sup> If the Court intends to help Congress and the state legislatures accelerate the appellate process by limiting successive federal habeas petitions, it should ensure indigent death row inmates that the first shot counts.

The Court ought to build on its two recent pieces of first-shot jurisprudence. In *McFarland v. Scott*,<sup>262</sup> the Court upheld the right of death row inmates to obtain congressionally funded counsel, not only for their initial federal habeas hearings, but also in drafting their initial federal habeas petitions.<sup>263</sup> In *Lonchar v. Thomas*,<sup>264</sup> the Court held that an original federal habeas petition cannot be denied even if it is submitted at the "eleventh

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257. See *supra* note 177 and accompanying text.

258. See *supra* note 181.

259. The Court had to do this in order to rely on *Pennsylvania v. Finley*, 481 U.S. 551 (1987). See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) ("We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.").

260. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (reinstating capital punishment).

261. For a discussion of the countermajoritarian dilemma facing the Court, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 240-43 (1966), which predicted that the Court would eventually declare capital punishment unconstitutional.

262. 512 U.S. 849 (1994).

263. Specifically, the Court held that the right to counsel precedes the filing of a federal habeas petition and that invoking the right can trigger a stay of execution. See *id.* at 856-57.

264. 116 S. Ct. 1293 (1996).

hour.”<sup>265</sup> The *Lonchar* Court held that the states’ interests in finality were outweighed by the inmate’s individual rights: “Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”<sup>266</sup> The important interests in human liberty at stake in *McFarland* and *Lonchar*—and the right to a meaningful initial federal habeas petition—are at stake in Gibson’s case as well.

### III. CONCLUSION

Thus far, the courts have been reluctant to apply wealth-based disparate impact theory to the criminal context.<sup>267</sup> The newly minted precedent, however, still has potential to remedy the effects of economic inequality. *M.L.B.* extended *Griffin*’s right of access to the criminal process to quasi-criminal cases such as parental termination appeals. It also vaguely limited *Washington v. Davis*. The Court should build on *M.L.B.* and recognize a fundamental rights exception to *Davis*’s discriminatory purpose requirement. It is unlikely that, as Justice Thomas feared, *M.L.B.* will be applied to civil cases such as custody battles and zoning fights. If the Court recognizes a fundamental rights exception, it could use *Griffin*’s right of access to remedy the effects of wealth discrimination in quasi-criminal cases such as capital state postconviction proceedings.

*Griffin*’s right of access to the criminal process should be used to overrule *Giarratano* on equal protection grounds and to provide counsel for indigent death row inmates at state postconviction proceedings. The Court’s ban on successive federal habeas petitions makes it imperative that indigent death row inmates get a meaningful first shot. The case of Exzavious Lee Gibson demonstrates the importance of providing counsel at least one time through the capital appellate process because of the fundamental right at stake. As Justice Brennan said in *Furman v. Georgia*,<sup>268</sup> capital inmates who are executed have “‘lost the rights to have rights,’” and dead prisoners are forever deprived

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265. *Id.* at 1301. In *Lonchar*, the inmate contested the method of his execution, not his death sentence.

266. *Id.* at 1299.

267. Courts have refused to apply *M.L.B.* to criminal cases involving transcript fees, much less the right to counsel. *See, e.g., Miller v. Smith*, 115 F.3d 1136, 1142 (4th Cir. 1997) (en banc) (rejecting an indigent inmate’s request for a free transcript for his habeas petition because he was represented by private counsel at trial, not the public defender’s office); *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997) (rejecting a constitutional challenge to the filing fees provision of the Prison Litigation Reform Act, 28 U.S.C.A. § 1915 (West Supp. 1996)); *Roller v. Gunn*, 107 F.3d 227, 238 (4th Cir. 1997) (same). *But see Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997) (holding that seeking reassignment from administrative segregation is not a fundamental interest at stake under *M.L.B.*, as would exist in a parental termination case, divorce decree, or challenge to the length of a sentence). The belief that a fundamental interest is at stake in contesting the length of a sentence suggests that *M.L.B.* might well apply to capital sentences.

268. 408 U.S. 238 (1972).

of the “right of access to the courts.”<sup>269</sup> If the Court recognizes a fundamental rights exception, it could operate the death penalty assembly line while ensuring that fundamental equal protection rights are preserved.

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269. *Id.* at 290 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion), *quoted in* Brief for Respondents at 28, *Murray v. Giarratano*, 492 U.S. 1 (1989) (No. 88-411)).

